RECORD AND BRIEFS

Nos. 16-285, 16-300, 16-307

In The
Supreme Court of the United States

EPIC SYSTEMS CORPORATION,
Petitioner,
v.
JACOB LEWIS,
Respondent.

ERNST & YOUNG LLP, et al.,
Petitioners,
v.
STEPHEN MORRIS, et al.,
Respondents.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
MURPHY OIL USA, INC., et al.,
Respondents.

On Writs Of Certiorari To The United States Courts Of Appeals For The Fifth, Seventh, And Ninth Circuits

BRIEF OF HR POLICY ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF EMPLOYER PETITIONERS AND RESPONDENT

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QUESTION PRESENTED

Whether the National Labor Relations Act renders unenforceable a Federal Arbitration Act–governed agreement requiring an employer and an employee to resolve employment-related disputes in non-class arbitration.

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INTEREST OF *AMICUS CURIAE*[1]

HR Policy Association is the lead public policy organization of chief human resource officers representing the largest employers doing business in the United States and globally. HR Policy brings these executives together not simply to discuss how human resource practices and policies should be improved, but also to create a vision for successful HR strategies and pursue initiatives that promote job growth, employment security, and competitiveness. This creates a positive work environment for employees throughout the Association's members. Senior corporate officers also participate in the Association to leverage the combined power of the membership as a positive influence to improve public policy, increase returns on human capital, and advance the human resource profession.

Among the strategies for bettering the work environment is the use of agreements between employers and employees to arbitrate employment-related disputes. The use of arbitration to resolve an individual's claims—rather than class or collective proceedings—plays a critical role in producing desirable outcomes for dispute resolution in the workplace. Importantly, it allows both sides to address these disputes in a manner

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[1] Pursuant to Rule 37.6, the *amicus* submitting this brief and its counsel hereby represent that neither the parties to this case nor their counsel authored this brief in whole or in part, and that no person other than *amicus* paid for or made a monetary contribution toward the preparation or submission of this brief. *Amicus* files this brief with the written consent of all parties, copies of which are on file in the Clerk's Office.

minimizing both the costs and delays associated with traditional litigation, including collective and class action proceedings—with employers often paying virtually all of the costs involved—and is ultimately more conducive to maintaining an ongoing and healthy relationship between the parties. The procedure also affords employees greater privacy than could be maintained in public court proceedings—an important consideration when so many employment claims involve a medical condition or disability of an employee or family member, or the employee's work performance and disciplinary history. Such privacy concerns are also important considerations for business entities as company trade secrets, customer data, and other proprietary and confidential information may be involved in a dispute. Furthermore, arbitration generates higher-value claims for individuals and provides an avenue for quicker resolution of those claims.

HR Policy has consistently advocated on behalf of its members regarding issues related to the National Labor Relations Act. By representing corporations with matters pending before the National Labor Relations Board, the Association works to ensure that Board determinations are sound, practical, and responsive to the realities of today's workplace. HR Policy thus has a significant interest in ensuring that the standards set forth by the Board are consistent with both the language and purposes of the Act. This includes the ability of corporations to use employment agreements that require employers and employees to

resolve employment-related disputes through non-class arbitration.

INTRODUCTION AND SUMMARY OF ARGUMENT

Arbitration agreements allow all parties to minimize the costs and delay of litigation. *14 Penn Plaza* v. *Pyett*, 556 U.S. 247, 257 (2009). They are especially useful in the employment context, where allowing companies and employees to agree to arbitrate an individual employee's claims avoids class mechanisms that "make the process slower, more costly, and more likely to generate procedural morass than final judgment." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 348 (2011). This helps explain why the Federal Arbitration Act, designed to promote arbitration in the face of the historical judicial hostility to it, "embodies the national policy favoring arbitration." *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 443 (2006).

The attempt here to circumvent previously agreed-upon arbitration provisions threatens this efficient system. Importantly, the current arbitration-favoring regime not only reduces litigation costs, it also provides better access to justice for all parties. Arbitration doubtless helps employers by protecting them from class exposure where the *in terrorem* effect can lead to unjust settlements of meritless claims. But it also helps employees in several areas.

First and foremost, the tendency of class or collective actions to settle claims on a generalized or formula basis—a result favored by plaintiffs' attorneys bringing the actions—can harm each individual employee by devaluing individual claims. Moreover, individual treatment of claims is much better for employees with stronger cases than the putative class representative(s). Additionally, not only are resolution costs cheaper for employees—with employers often paying virtually all of those costs—arbitration provides the individual employee with a result (and thus a remedy) in a matter of months rather than years. See, e.g., Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 55 (1998) (reporting that the average employment discrimination case takes almost two full years to complete in litigation but only 8.6 months to resolve through arbitration); Edna Sussman & John Wilkinson, *Benefits of Arbitration for Commercial Disputes*, Arbitration Committee of the ABA Section of Dispute Resolution, at 1-2 (noting that pursuing a case through appeal can take almost three-and-a-half years, on average).[2] And this does not even account for the additional time needed to resolve collective or class-action litigation as opposed to individual litigation.

Furthermore, employees gain advantages through the processes involved with arbitration. Individual arbitration provides increased confidentiality, allowing

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[2] Available at http://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/March_2012_Sussman_Wilkinson_March_5.authcheckdam.pdf.

employees to raise claims involving things such as medical conditions and disciplinary issues without making that information a matter of public record. Arbitration also provides a system in which employers generally have a diminished ability to use dispositive motions prior to an evidentiary hearing and where procedural defenses, such as limitations and jurisdiction, tend to be less likely to be accepted. And because collective and class action claims often involve extensive notice procedures, discovery proceedings, and motion practice—which arbitrators often do not have the requisite staff and resources to resolve—resolution in court works against employees who would be better served by individual arbitration. Although the putative class representatives here—or their counsel—may choose to jettison these benefits and protections in favor of their own interests in aggregating claims, there is no legal basis for doing so—particularly given the strong federal policy in favor of arbitration.

The Board's position involves at least three incorrect assumptions that require its rejection. First, bringing a class action cannot be "concerted activity" under the Act because, by definition, that procedural device is used to aggregate the claims of people who may be unknown to the named plaintiff(s). The mere act of bringing a class action does not involve working in concert with those who have not provided their consent or authority. Plaintiffs are not required to be authorized to represent other employees and seldom, if ever, have personal knowledge of what employees may

end up being part of the "class." Thus there is no concerted activity outside of the named plaintiffs themselves. Indeed, *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*), & *Meyers Industries*, 281 NLRB 882, 885-86 (1986) (*Meyers II*), stand for the proposition that there cannot be virtual representation under the NLRA. In other words, the existence of a class action that may affect others does not create the requisite concertedness between the putative representative and other parties they seek to represent. The proper inquiry should consider actual interactions between employees, not the perceived interests they may share. *Meyers II*, 281 NLRB at 886, 888.

Because Rule 23 and collective actions are designed to let named plaintiffs act as self-designated surrogates for the entire class—a permission unavailable under *Meyers*—the procedural device cannot satisfy the requirement that employees must be acting in concert. Further proof that plaintiffs are not acting in concert with absent, unknown class members can be seen in the fact that class representatives can settle unilaterally their individual claims before certification. Plaintiffs—along with the Seventh and Ninth Circuits—assumed that class actions would qualify as concerted activity. That misreads this Court's cases. To the extent that "concerted activity" in the statute provides for group litigation, it still requires the action to be taken in concert—an element persistently absent here.

Second, employees are *exercising* their NLRA rights when they agree to arbitrate disputes on an individual basis—not waiving them. Section 7 confers the right of an individual not only to join in concerted activities but also to *refrain* from them. Likewise, Section 9 allows the employee to adjust claims on an individual basis at any time. The Board's own opinion, *D.R. Horton*, underscores this point as it concedes that unions may prospectively waive employees' rights to bring a group action in court. *D.R. Horton, Inc.*, 357 NLRB 2277, 2286 (2012). If the employee may delegate that right to the union, the employee must certainly possess the right in the first instance. Cf. *14 Penn Plaza*, 556 U.S. at 258 ("Nothing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative.").

Third, the FAA's savings clause, by its express terms, applies only to generally applicable contract defenses like fraud or duress, not to a defense unique to employee class waivers. It is this Court's contrary congressional command jurisprudence—not the Seventh or Ninth Circuits' incorrect interpretation of the savings clause—that provides the rule of decision whenever there is an arguable conflict between the FAA and another federal statute. See, e.g., *CompuCredit Corp.* v. *Greenwood*, 565 U.S. 95, 103-04 (2012). Indeed, if the Seventh and Ninth Circuits' analysis of the savings clause were correct, then *Concepcion* would have come out differently.

For these reasons, the judgments of the Seventh and Ninth Circuits should be reversed, and the judgment of the Fifth Circuit affirmed.

ARGUMENT

I. Filing A Class Action Is Not Concerted Activity Shielded By Section 7.

Section 7 of the NLRA allows employees to engage in "*concerted* activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157 (emphasis added). Contrary to the Seventh and Ninth Circuit opinions, *Epic* Pet.App.5a-6a & *Ernst* Pet.App.17a, class actions do not fall within this category of protected activities. That is because filing a class action involves taking action without the knowledge and consent of others—bare necessities for activity to be done in concert. Two or more employees can act together to file a lawsuit, but it is a different matter entirely when employees purport to file a class action on behalf of unidentified others. There is no "meeting of the minds"—as normally evidences agreement in the law—on which to base the activity. Moreover, the mere fact that class litigation may affect others does not mean that concertedness may be presumed. See *Meyers II*, 281 NLRB at 888 (rejecting "constructive concerted activity" theory). Thus filing a class action—properly measured at the moment a

suit is filed—cannot be "concerted activity" under the Act.

The NLRA itself does not define "concerted activities." See *Bekele* v. *Lyft, Inc.*, 199 F. Supp. 3d 284, 308-09 (D. Mass. 2016). Whether an action is "concerted" depends on the precise manner in which the actions of one employee are linked to the actions of fellow employees, rather than to the perceived interests of the other employees. See *Meyers II*, 281 NLRB at 886 (holding that the question of whether an employee has engaged in concerted activity is a factual one based on the totality of the evidence). As noted by Judge Ikuta's dissent in *Ernst & Young*, the meaning of "concerted" when the NLRA was enacted is "mutually contrived or planned: agreed on." *Ernst* Pet.App.35a-36a (quoting WEBSTER'S INT'L DICTIONARY OF THE ENGLISH LANGUAGE 295 (1903 ed.)). The case law interprets "concerted" under Section 7 in the same common-sense way: the activity must be engaged in with or on the authority of other purportedly involved employees. See *Ontario Knife Co.* v. *NLRB*, 637 F.2d 840, 845 (2d Cir. 1980); *NLRB* v. *Portland Airport Limousine Co.*, 163 F.3d 662, 664-65 (1st Cir. 1998). An employee thus engages in "concerted activity" when he acts jointly with or is expressly authorized to act on behalf of one or more other employees.

A Rule 23 class is a rule-created, judicially imposed relationship that positions the named class representatives and class counsel as surrogates of the entire class—without any agreement, joint action, or

necessarily any knowledge whatsoever. A class representative's status as a representative is "voluntary and non-contractual." RESTATEMENT (SECOND) OF JUDGMENTS § 41(1)(e) cmt. f (1972). Rule 23 does not require that the representation be explicitly or even implicitly consensual.

Plaintiffs here are acting on behalf of themselves and, solely through procedural devices like Rule 23, purporting to act on behalf of putative class members. Yet plaintiffs have not been expressly authorized to represent those other employees, nor have those other employees joined with plaintiffs in group action. The fact that the *Epic* and *Ernst & Young* complaints were initially filed by only one plaintiff each, *Epic* Pet.App.24a, *Ernst* Pet.App.43a, necessarily means that they are not actually joined by any other employees beyond the named ones at the time suit was filed. Neither have plaintiffs been authorized to pursue the claims of others but, instead, seek to invalidate their class-action waivers by unilaterally designating themselves to act for a class of absent individuals who have not consented to joining the instant action. This action is not concerted. It is neither mutually contrived nor planned—there is no agreement whatsoever outside the named plaintiffs.[3]

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[3] However one might view the argument that two or more plaintiffs agreeing to file a lawsuit, and taking action together to do so, is "concerted activity" under the Act, attempting to act on behalf of an absent class—unknown, unconsenting, and ignorant of the lawsuit—is a conceptual world apart.

This fundamental problem cannot be solved by the allegedly common interests of the putative class members. The plaintiffs have already begun to act for their benefit, but without knowing all other class members. To conclude otherwise would resurrect the theory of "constructive concerted activity," a theory rejected by the Board and Circuit Courts. See *Meyers I*, 268 NLRB at 497; reaffirmed, *Meyers II*, aff'd, 835 F.2d 1481 (D.C. Cir. 1987); see also *Prill* v. *NLRB*, 835 F.2d 1481, 1483 (D.C. Cir. 1987) (affirming NLRB decision holding that "if a worker takes action by himself without contacting his fellow employees, even though he has a desire to help all workers, not just himself, he will not have satisfied the concerted action requirement").

The lack of necessary "concerted activity" in such cases is also demonstrated by the fact that a named class representative can settle his individual claim before class certification. See *Campbell-Ewald Co.* v. *Gomez*, 136 S. Ct. 663, 672 (2016). If the class action were truly a "concerted" action, it could not be extinguished by the voluntary plaintiff's unilateral decision to dismiss it. Similarly, if a class action were necessarily a concerted action, settlement or a judgment in the action should bind all class members prior to certification—but a settlement or judgment prior to certification has no binding effect on absent class members. See *Standard Fire Ins. Co.* v. *Knowles*, 133 S. Ct. 1345, 1349 (2013).

To invalidate a class-action waiver on these facts would mean that an employee can deliberately evade an arbitration agreement containing a class-action

waiver merely by paying a nominal filing fee and filing a complaint that satisfies the notice pleading requirements of Rule 8. Such an act can hardly be "concerted" when no one other than the named plaintiff(s) knows that they are "engaged" in the act. There is no reason that plaintiffs here should be relieved of their contractual agreement to resolve their claims on a non-class basis through the simple expedient of purporting to bring claims on behalf of others who have not authorized them to act.[4]

To be sure, this Court has included "resort to administrative and judicial forums" together with others, in the pantheon of *potential* concerted activity protected by the NLRA. *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 565-66 (1978). Likewise, as the Seventh Circuit noted (at *Epic* Pet.App.5a), this Court has recognized that an employee acting alone may still qualify as "concerted activity" when intending to induce group activity or acting as a representative of at least one other employee. *NLRB* v. *City Disposal Sys., Inc.*, 465 U.S. 822, 831 (1984). The error made by the Board and Seventh Circuit there was to assume this meant that class

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[4] The result is no different in Fair Labor Standards Act "opt-in" collective action cases. The named plaintiff(s) has already gone to the court, without the knowledge and permission of any other potential litigant, and engaged the court's processes to begin the action against the employer. The plaintiff(s) wants the court to provide notice—as Judge Posner memorably put it, the plaintiff wants to ask "the judge * * * to [act as] town crier, ringing the tocsin to awaken those who may be sleeping on their rights," *Woods* v. *N.Y. Life Ins. Co.*, 686 F.2d 578, 582 (7th Cir. 1982)—in order to aggregate potential claims with unknown others who do not know of and have not authorized the action.

action filings are necessarily "concerted activity," and to ignore the limited circumstances under which this Court has allowed one employee to engage in "concerted activity." That error conflates this Court's holding that litigation *can* constitute protected activity in some limited instances with the question of whether litigation actually *is* protected (because it is concerted) in any particular instance.

The Seventh Circuit, for example, overread *City Disposal* to justify treating a single plaintiff's class action as concerted activity. That is because *City Disposal* specifically dealt with the "invocation of a right derived from a collective-bargaining agreement." *Id.* at 830. The plaintiff there (ostensibly) acted on behalf of other union members when he refused to drive a truck that violated provisions in the collective bargaining agreement for vehicle safety. *Id.* at 826-28. The employee was taking action by himself, but it was to enforce agreed-upon substantive rights in the collective bargaining agreement and would inure to the benefit of all employees no matter what else the employee did—as the dissent described the majority's position, "the reasonable, good faith assertion of a right contained in the collective bargaining agreement is said to be an extension of the concerted action that produced the agreement." *Id.* at 842 (O'Connor, J., dissenting). Because the right came from concerted activity in the first instance, this Court held that "[a] lone employee's invocation of a right grounded in his collective-bargaining agreement is, therefore, a concerted activity in a very real sense." *Id.* at 832 (majority opinion).

That is different from the present cases where class- or collective-action procedural devices have not been guaranteed through concerted activity, such as a collective bargaining agreement. If such mechanisms had been negotiated in collective bargaining, the actions of an individual plaintiff here seeking class certification might well qualify as "concerted activity" under *City Disposal*. As it is, the guarantees of *City Disposal* and *Eastex* do not apply to class actions and the filing of class-action complaints here cannot qualify as "concerted activity."

Some Board members, of course, believe that wage and hour class actions are an acceptable form of concerted activity. But the artificial relationship imposed by engaging the court's processes—through class or collective action—cannot constitute "concerted activity" since it would be the court, not the employee(s), taking the action that generates concert. Consider that even the Board itself has acknowledged that "there is no right to use an employer's bulletin board" in order to engage in union activity. *Mid-Mountain Foods*, 332 NLRB 229, 230 (2000) (quoting *Honeywell, Inc.*, 262 NLRB 1402 (1982), enforced, 722 F.2d 405 (8th Cir. 1983)). In other words, when an employee engages in concerted activity, she cannot force the employer or another third party to take an action for her (such as posting flyers on a bulletin board or making copies of handbills for her to distribute). This common sense example shows that an employee attempting to commandeer another party for its purposes does not

constitute concerted activity of the type protected by the Act.

As the dissent in *Murphy Oil* explained—see *Murphy Oil* Pet.App.70a-72a (Member Miscimarra, dissenting)—*amicus* is not arguing here that employees engaging in collective litigation can never be concerted activity. Only that employees do not have a statutory right to use the machinery of the courts—such as Rule 23 or a court's collective action notice procedures—to create concertedness. That is necessarily a separate step (as any procedural device would be) that is not covered by the Act.

Assuming that some actual concerted activity between two or more identifiable individuals might take place in the future if a court uses class or collective notice procedures also does not bring the filing of a class or collective action within the scope of the Act. Indeed, there is no guarantee that any concerted activity will take place in the future. Class and collective actions are brought "on behalf of" members of the class and those alleged to be similarly situated. FED. R. CIV. P. 23(a); 29 U.S.C. § 216(b). There is no requirement that the named plaintiff(s) or their counsel communicate with members of the class or work together with them. In fact, class certification or class identification proceedings may result in class representatives and their counsel taking positions that are contrary to the interests of other employees—the complete opposite of concerted protected activity.

Further, even if one incorrectly assumed that class litigation eventually results in some type of concerted activity, one still needs to consider the practical realities of class- and collective-action litigation. The costs and distractions begin from the moment a class or collective action is filed—companies are forced to spend considerable sums and divert significant human capital in mere preparation for litigation and throughout class certification proceedings. In many cases, the mere filing of class litigation or the expense involved in class discovery will force a settlement and such "settlement" may be adverse to, or not fully address, the interests of other employees—again, contrary to the concept of protected concerted activity. This further illustrates why the "concerted activity" must be measured from the moment a suit is filed rather than some future time when the court's procedures could possibly manufacture some actual concerted activity.

In sum, the simple act of filing a class- or collective-action lawsuit—in an attempt to use judicial processes to troll for possible co-plaintiffs—cannot qualify as concerted activity under the Act. Thus the arbitration clauses at issue here should be enforced.

II. Arbitration Agreements Are An Exercise Of NLRA Rights, Not A Waiver Of Them.

Independent from the lack of concerted activity in the class actions filed here, plaintiffs are unable to evade their arbitration agreements because those agreements represent an *exercise* of their NLRA right

to decline participation in class litigation—not a waiver of any right protected by the NLRA.

Section 7 of the NLRA confers on employees the right to agree on procedures for resolving their individual disputes. Section 7, as originally enacted in 1935, addressed only the rights of workers "to organize, to bargain collectively, and to engage in concerted activity for their mutual aid and protection." *Chamber of Commerce of U.S.* v. *Brown*, 554 U.S. 60, 66 (2008). "Concerned that the [1935 version] had pushed the labor relations balance too far in favor of unions, Congress passed the [Taft-Hartley Act] amend[ing] §§ 7 and 8 in several key respects." *Id.* at 67. Among other things, the Taft-Hartley Act explicitly granted employees the statutory right to refrain from activities protected under Section 7. *Ibid.* Section 7 now states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities* except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 157 (emphasis added).

The NLRA does not mandate that employees resolve their disputes through group litigation, nor does it forbid employees from exercising their Section 7 right contractually to refrain from participating in group litigation. Instead, Section 7 unequivocally grants employees the right not to participate in concerted activity. When an employee agrees to an arbitration agreement with a class-action waiver, that employee has exercised his Section 7 right to decline participation in concerted litigation.[5]

The NLRB's decision in *D.R. Horton, Inc.*, reinforces the point. There, the majority held that employees may delegate to their unions the right to agree, in advance, to have their members' future disputes decided in individual arbitration. See *D.R. Horton*, 357 NLRB at 2286 (citing *Pyett*, 556 U.S. at 258 (holding that a union, in a collective bargaining agreement, may prospectively agree to individual arbitration and waive employees' rights to bring an action in court)). If this

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[5] As this Court has noted in *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), agreement as a condition of employment is acceptable in this context. The arbitration agreements do not qualify as a modern-day equivalent of "yellow-dog contracts" since they do not seek to curtail the employee's right to unionize or bargain collectively. See, e.g., *Nat'l Licorice Co.* v. *NLRB*, 309 U.S. 350, 360 (1940) (invalidating agreements where employees agreed not to "demand a closed shop or a signed agreement by his employer with any Union"). Those holdings deal with core NLRA activities (unionization, collective bargaining, etc.) and not the process for litigating claims arising under other statutes such as the FLSA or Title VII. As such, the arbitration agreements are not "a continuing means of thwarting the policy of the Act." *Id.* at 361.

were a nonwaivable statutory right, then an employee would not be able to waive that right prospectively through his union.

Moreover, an employee who can delegate such a right to a union certainly may choose to exercise that right himself. "Nothing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative." *Pyett*, 556 U.S. at 258. Indeed, a fundamental principle of agency law is that a principal may not delegate to his agent authority which he himself does not possess. See RESTATEMENT (SECOND) OF AGENCY § 17 (1958). The Seventh and Ninth Circuits' decisions fail to consider employees' statutory right to refrain from collective activity, and, in fact, strip individual employees of this right. Plaintiffs here, exercising their Section 7 and 9 rights, agreed to proceed on a non-class basis with respect to their employment disputes. That agreement is entitled to enforcement.

Section 9(a) of the Act likewise protects the right of every employee as an "individual" to present and adjust grievances, "*at any time*," "without the intervention of the bargaining representative." 29 U.S.C. § 159(a) (emphasis added). This "individual" right to "adjust" a dispute "at any time" necessarily encompasses an employee's right to agree with his employer on the procedures by which those individual disputes will be resolved. Not only does Section 9(a) safeguard the individual employee's right to enter into arbitration agreements with his employer to "adjust" claims

on an "individual" basis, but the Act also expressly protects his right to do so "at any time."

These same points have been made by now–Acting Chairman Miscimarra in multiple Board cases. See, e.g., *Murphy Oil* Pet.App.115a-124a (Member Miscimarra, dissenting in part). He argues that "Section 9(a) protects the right of every employee as an 'individual' to 'present' and 'adjust' grievances 'at any time'" and that Section 7 "protects each employee's right to 'refrain from' exercising the collective rights enumerated in Section 7." *24-Hour Fitness USA, Inc.*, 363 NLRB No. 84, slip op. at 3-4 (2015) (Member Miscimarra, dissenting).

Because the exercise of NLRA rights cannot be a waiver of them, the arbitration agreements at issue here are enforceable.

III. The FAA's Savings Clause Does Not Allow Courts To Make An End-Run Of The Analysis Required By This Court's Cases.

As the parties have argued, the FAA's savings clause cannot be used to justify ignoring the FAA's own strong policy in favor of arbitration. The savings clause provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction * * * shall be valid, irrevocable, and enforceable, save upon

> such grounds as exist at law or in equity *for the revocation of any contract*.

9 U.S.C. § 2 (emphasis added). Plaintiffs—as well as the Seventh and Ninth Circuits—have argued that the "savings clause" somehow allows courts to bypass the FAA because class-action waivers are grounds for revocation of the arbitration agreement. But by its express terms, the savings clause applies only to generally applicable contract defenses like fraud or duress, not to a defense unique to employee class waivers. *Concepcion*, 563 U.S. at 339 ("This saving clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses * * * ' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.").

It is *Concepcion* and the Court's contrary congressional command jurisprudence (as seen in *CompuCredit*)—not the Seventh and Ninth Circuits' interpretations of the FAA's savings clause—that provide the roadmap for addressing any conflicts between the FAA and other statutes. In *Concepcion*, this Court articulated one critical aspect of the analysis for resolving any conflicts between the FAA and other laws. In that case, the California state-law policy disfavoring arbitration agreements was forced to yield to the purposes and objectives of Congress embodied in the FAA. *Id.* at 352. Importantly, this Court so ruled because the defense at issue only existed because of the presence of an arbitration provision with a class-action

waiver. Because it was not a generally applicable contract defense that provided "for the revocation of any contract," the savings clause was not triggered. 9 U.S.C. § 2. The same thing is true here.

But under the Seventh and Ninth Circuits' current approach, the specific presence of an arbitration provision with a class waiver is all that is needed to activate the savings clause. This is in direct opposition to *Concepcion*'s teaching. See *Kindred Nursing Ctrs. LP* v. *Clark*, 137 S. Ct. 1421, 1426 (2017) (holding that the savings clause "establishes an equal-treatment principle: A court may invalidate an arbitration agreement based on 'generally applicable contract defenses' like fraud or unconscionability, but not on legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" (quoting *Concepcion*, 563 U.S. at 339)). Like the state law in *Kindred Nursing*, using the Act in the way the Board argues would "covertly accomplish[] the same objective" as a law that outright prohibited arbitration. *Ibid.* But since the presence of an arbitration clause is not a traditional contract defense such as fraud, it cannot be used to invoke the savings clause here.

Any notion that this analysis is applicable only to state laws—as in *Concepcion* or *Kindred Nursing*—is disproved by *CompuCredit*, which provides the analytical framework for evaluating federal laws arguably in conflict with the FAA, and treated a federal statute (the Credit Repair Organizations Act) the same way. *CompuCredit*, 565 U.S. at 103-04. There, the statutory

language indicated that customers had the "right to sue" and that waivers of consumer protections were invalid. *Id.* at 99. This Court held, however, that such language was not a sufficiently clear congressional command to prevent arbitration. *Id.* at 103-04.

This follows the familiar analysis set forth in *Gilmer*. There, this Court rejected the claim that judicial enforcement of the Age Discrimination in Employment Act was a nonwaivable right because, even though the Act allowed for a judicial forum and expressly authorized—like the FLSA—bringing collection action claims, it "did not explicitly preclude arbitration" (which necessarily means that class actions were excluded). 500 U.S. at 29-32. Because Congress has not demonstrated with "clarity" the intent to override the FAA in this context, its mandate to enforce arbitration agreements remains in place. See *CompuCredit*, 565 U.S. at 99-103.

Because of the federal policy favoring arbitration, "courts must place arbitration agreements on an equal footing with other contracts." *Concepcion*, 563 U.S. at 339. But if the Seventh and Ninth Circuits were correct, arbitration agreements will always naturally play second fiddle to contrary laws under the savings clause analysis. Indeed, *Concepcion* itself would have come out differently—the FAA's savings-clause exception would have allowed the contrary law to trump the arbitration agreement. The same is true of *CompuCredit*. Taking away that rule would mean that the FAA would always give way to other statutes. See

Ernst Pet.App.39a-40a (Ikuta, J., dissenting). That cannot be right.

Finally, using the savings clause to do an end-run around this Court's analysis in *Concepcion* and *CompuCredit* is completely misplaced given that the resolution of non-NLRA claims does not affect core Section 7 rights. The Board has "power to adjudicate the validity or effect of [individual employment] contracts * * * as to their effect on matters within its jurisdiction," but such power is applicable primarily to contracts "utilized to forestall collective bargaining and deter self-organization." *J.I. Case Co.* v. *NLRB*, 321 U.S. 332, 340 (1944). That is because these are the Act's core concerns.[6]

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[6] Not even all concerted activity is protected by the Act, depending on the manner in which it is exercised. See *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793 (1945). For example, an employer cannot prevent an employee from discussing unionization at the water cooler during break time, but could prevent an employee from discussing unionization while talking to customers. See *id.* at 803 n.10. While restricting an employee's ability to bring collective litigation entirely may be different than a "time and place" restriction on organizing activity, the underlying principle is the same: certain restrictions may interfere with an employee's attempt to engage in "concerted activity" without making it an unfair labor practice (let alone provide a generally applicable contract defense capable of triggering the savings clause). See *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 229 (1963) (noting that the Board must undertake the "delicate task" of "weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner" before finding a Section 8 violation).

The Board overlooked this point in *D.R. Horton* by failing to recognize that Section 7 rights fall on a spectrum and, at some point, must be balanced against other statutory and common law rights. See *Hudgens* v. *NLRB*, 424 U.S. 507, 521-23 (1976) (stating that whether Section 7 rights must give way to other legal rights, such as property rights, "largely depend[s] upon the content and the context of the [Section] 7 rights being asserted"). Whether an FLSA, Title VII, or other employment law claim is litigated on a class or collective basis, or whether it is subject to individual arbitration, is further away from the NLRA's core concerns—organizing and collective bargaining—and thus should be balanced against the concerns of the FAA. *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U.S. 137, 144 (2002) ("[W]e have accordingly never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA.").

While Congress could override the FAA explicitly, if the contrary analysis offered by the Seventh and Ninth Circuits were correct, even a federal statute that inadvertently made arbitration agreements unlawful—or, of course, any state statute that did so explicitly—would prevail over the FAA by virtue of the savings clause. The exception would thus swallow the rule. This is wrong under the plain language of the savings clause; it is wrong under Congressional policy embodied in the language of the FAA; it is wrong under this Court's precedents; and it is inconsistent with the

rights conferred by the NLRA. Such an interpretation—creating conflict with multiple statutes and precedents—cannot be correct and must be overruled.

CONCLUSION

The judgments of the Seventh and Ninth Circuits should be reversed, and the judgment of the Fifth Circuit affirmed.

Respectfully submitted,

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